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SEP 30 1960
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No. 375

In the Supreme Court of the United States

OCTOBER TERM, 1960

FEDERAL TRADE COMMISSION, PETITIONER

v.

WALTER L. DILGER, SECRETARY,
BEATRICE FOODS CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE SECRETARY OF COMMERCE

ROBERT J. DODDS, JR.,
General Counsel,

KENNETH F. MCCLURE,
Assistant General Counsel,

MATTHEW E. ERICKSON,
Attorney,

Department of Commerce, Washington 25, D. C.

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MEMORANDUM FOR THE SECRETARY OF COMMERCE

At the request of the Secretary of Commerce, the attached memorandum setting forth his views on the issues presented by this case is respectfully submitted to the Court.

J. LEE RANKIN,
Solicitor General.

The Secretary of Commerce believes that the decision of the Court of Appeals in this case is correct, and that a contrary decision would have an extremely serious effect on the operations of the Department of Commerce. This memorandum describes the practical

and policy considerations which, in the view of the Secretary of Commerce, require that retained copies of census reports be kept confidential and not subject to subpoena by the Federal Trade Commission.

The Department of Commerce through the Bureau of the Census takes censuses, including the census of population and housing and the census of business and manufactures. In the census of business and manufactures the reporting company files a schedule with the bureau, and retains a copy for its file. To allow the Federal Trade Commission to subpoena from reporting companies their retained copies of schedules submitted to the Bureau of the Census will seriously interfere with the administration of the program of censuses and the aims of such programs, which are the accumulation and dissemination of comprehensive statistical data. Such data, to be meaningful, must measure characteristics or activities under definitions applied uniformly from company to company and the replies must be promptly furnished and tabulated.

Business records are kept for many purposes, but the need for providing precise, prompt, and accurate replies to inquiries from the Bureau of Census is a need which may be assigned little priority by the company in determining how its records are to be kept. In such cases, the immediate answer to such inquiries is then that the records do not provide the desired information or that final compilations will not be available until some time in the future. An analyst of the Bureau of the Census who is familiar

with the particular industry then undertakes to work out, with his opposite number in the reporting company, an estimate based on information in the records as kept. Experience has shown that the technician of the Bureau of the Census, because of his knowledge of the industry under consideration, may question some estimates as unrealistic and request consideration of other factors before an estimate is agreed upon.

This technique of developing information is described in some detail to demonstrate how inappropriate it would be to require these figures for the different purposes of the regulatory agency and more importantly to show how helpless the Bureau of the Census would be in its quest for data once it becomes established that these estimates are available to regulatory agencies. Then the answer, that the records of the company do not provide the information requested by the Bureau of the Census, will become the final answer. This concern is not mere speculation but is based on statements by officials of reporting companies made after the decision of the District Court in this cause.

In the present administration of the Census laws relating to collection of information from businesses, the Census form is filled out by technicians of the reporting company. This is particularly desirable in the interest of prompt reporting and publication of resulting statistics which are of increased value because current. If the individual data instead of being lost in a sea of statistics are to be the subject of scrutiny by regulatory agencies, they will be forth-

coming from the reporting company only after consideration by officials of the company concerned not with accuracy alone but rather with possible effects of the data in the hands of regulatory agencies.

Distinctions which may be drawn between the confidentiality which may attach to the original schedule filed by a company reporting and copies thereof retained in accordance with the express request of the Bureau of the Census by a company reporting are unwarranted in so far as the significance of confidentiality is concerned as it affects the operation of the program of censuses. In so far as integrity of data making up the statistics, and necessary cooperation between the company reporting and the Bureau of the Census are concerned, knowledge that either the original or copies, retained or otherwise, of schedules are to be available for scrutiny by regulatory agencies produces the same imposing handicaps to the Department in its administration of the program of censuses. If the retained copy is available, it does not matter to any of the interested parties that the original is not so available. (Of course, the company's own records and data, on the basis of which the reports are prepared, are not immune from subpoena.)

The importance of the retained copy of such a schedule to the Bureau of the Census should be stressed. This copy serves as a reference point for discussion between the Bureau of the Census and the company reporting. This is true not only of a current census but also of a subsequent census and of intermediate surveys which may be undertaken. In

light of the aim for current data and statistics the importance of a readily available reference is apparent. This copy in the hands of the company reporting is more important to the Bureau of the Census, therefore, than to the company. It is for these reasons that the Census Bureau requests that a copy be retained by the reporting companies; and its promise of confidential treatment of the information contained therein is intended to cover such copy, as well as the original.

The need for prompt and accurate data which would be seriously jeopardized by the availability of retained copies is so important, however, to the Bureau of the Census in carrying out the program of censuses that, if the decision below were reversed and retained copies were made available to regulatory agencies, the Department would have no alternative but to seek other methods of providing workable references. An alternative which suggests itself is the forwarding to the company its original schedule, when needed, to be returned to the Bureau of the Census when the immediate need is fulfilled. This procedure would be less satisfactory to all parties concerned and no retained copies would then be available for scrutiny by others.

Finally, copies of schedules should not be made available because the Department of Commerce should not be prevented from keeping its word to companies reporting when the Department has promised that the report cannot be used for purposes of taxation, investigation, or regulation. This promise parallels the promise of the President set forth in the opinion

of the Court of Appeals based on Section 9 of the Census Act, which is applicable to both censuses of population and housing and censuses of business and manufactures since both are taken under authority of Title 13 of the United States Code. Reversal of the opinion under consideration would make a dead letter of assurances of confidentiality.

The completeness, accuracy, and timeliness of the statistical reporting system of the Bureau of the Census are founded on cooperation by the reporting companies. This cooperation is obtained by pledging the confidentiality of the relationship between the reporting companies and the Bureau of the Census. No threat of punishment or penalty can substitute for the cooperation now obtained through confidentiality; certain of the reports, obtained on a voluntary basis, are not subject to penal provisions for failure to file a report. To intrude into this relationship is to destroy it and thereby seriously impair the ability of the Bureau of the Census to furnish the people and their government necessary measures of the social and economic conditions of the United States.

Respectfully submitted,

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SEPTEMBER 1960

U. S. GOVERNMENT PRINTING OFFICE 1960 — 586229 355